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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945. No. 816

PROVIDENT TRUST COMPANY OF PHILADELPHIA, TRUSTEE,
Petitioner,

v.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945. No. .

Provident Trust Company of Philadelphia, Trustee,

Petitioner,

v.

The Metropolitan Casualty Insurance Company of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, respectfully prays this Court for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, to review the final judgment of that Court entered on December 17, 1945, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania entered on July 24, 1944.

A certified transcript of the record in this case, including the proceedings in said Circuit Court of Appeals, together with the requisite additional copies thereof, is furnished herewith, in conformity with Rule 38 of this Court.

STATEMENT OF THE MATTER INVOLVED.

This case and its companion case (No. 8846 in the Circuit Court of Appeals) were tried together by the District Court and they present identical questions for decision here. The only difference is that in this case the plaintiff is suing as trustee and not in its individual capacity, as it does in the companion case.

The plaintiff is a Pennsylvania corporation and the defendant is a New York corporation. The amount involved is more than $3,000.00 and the jurisdiction of the Federal Courts is based upon the diversity of citizenship.

Judgment was for the plaintiff, now petitioner, in the District Court for the sum of $411,252.48 (R., p. 355a). This judgment was reversed by the Circuit Court of Appeals for the Third Circuit. Since neither the opinions of the District Court nor the Circuit Court of Appeals have been officially reported as yet, they are attached hereto in appendix form for the convenience of this Court.

The action is against a corporate surety, Respondent, on a bond, of the type known commonly as a "completion bond", given in connection with a building operation.

The District Court made findings of fact which were based upon stipulations of counsel and the testimony of one witness (R., pp. 48a-69a, 104a-167a, 347a, 364a). These findings are the basis of the following discussion.

The transaction giving rise to this suit was a building operation in 1928. The promoter of the operation, Equitable Bonded Mortgage Company (hereafter sometimes called "promoter" or "Equitable") entered into a written contract with a certain builder to advance money for the operation in return for mortgages on dwellings to be erected. The first mortgages were to go to Equitable and the second mortgages to Equitable's wholly owned subsidiary, Equitable Securities Corporation (R., pp. 55a,

219a, 337a, 326a, 342a). Equitable applied to petitioner trust company for a loan to obtain a substantial part of the necessary funds, the loan to be secured by the first mortgages covering the dwellings to be erected (R., p. 140a). The petitioner made an appraisal of the proposed buildings on a completed basis, and approved the loan subject to securing a surety bond to guarantee completion (R., pp. 140a-141a, 135a).

Petitioner thereupon became trustee under a trust agreement with Equitable to secure an authorized issue of Equitable's 5½% Gold Bonds, the trust estate to consist of the first mortgages and the surety completion bond (R., pp. 105a-106a).

The required bond was executed by respondent surety and builder on September 11, 1928 (R., p. 105a). Equitable was named therein as obligee, but Equitable simultaneously executed a written assignment to petitioner trust company, and even prior to delivery of the bond to Equitable the respondent surety executed its formal consent to the assignment. The bond, assignment, consent to assignment, power of attorney and statement of surety's financial condition were all bound together by surety and delivered to Equitable (R., pp. 105a, 413a). On September 13, 1928, Equitable delivered the document to petitioner along with the mortgages (R., p. 105a).

The condition of the bond was as follows:[1]

> "NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the buildings hereinabove mentioned shall be fully constructed and completed in accordance with the plans and specifications above referred to, and herein incorporated with like force and effect as if attached hereto, free and clear of mechanics' liens and municipal claims, within twelve (12) months from the date hereof, then this obligation

[1] A photostatic copy of the bond and attached papers appears in the record at page 413a.

to be void; or else to be and remain in full force and effect."

On September 14, 1928, petitioner delivered $280,000 face value of Equitable's 5½% Gold Bonds to The Philadelphia National Bank as collateral security for a loan of $224,000 made by said Bank to Equitable (R., p. 106a). The said Gold Bonds became due on September 1, 1929, but they have never been paid (R., p. 106a). None of the buildings in the development was ever completed; and, in fact, most of them never proceeded beyond the cellar stage (R., p. 107a).

The respondent surety raised several defenses in the actions on the bonds but the only one of significance here, in view of the decision of the Circuit Court of Appeals, is that based upon the fact that Equitable had breached the building agreement by failing to make the total required advances to the builder.

The District Court entered judgment for petitioner in the total amount, including interest at 3%, of $411,252.48 on July 24, 1944. Its decision was based on its finding of fact that the parties had intended that the bond should be a direct obligation from the builder and respondent surety to petitioner, and that, hence, a breach of the agreement between the builder and Equitable was immaterial.

The Circuit Court of Appeals reversed this judgment on December 17, 1945. It gave two reasons for so doing. First was its finding of fact, contrary to the District Court's, that the parties had intended only that the petitioner should take the bond by assignment, and thus the surety could raise the defense of non-performance under the builder's agreement since it could have done so in an action by Equitable, petitioner's assignor. Secondly, the Circuit Court held that under the law of Pennsylvania a bond such as this is not given for the completion of the buildings but for the performance of the building contract.

BASIS OF THIS COURT'S JURISDICTION.

This Court has jurisdiction of this case under Section 240(a) of the Judicial Code of 1911, as amended by the Act of February 13, 1925, Chap. 229, Sect. 1; 28 U. S. C. A. Sect. 347. The opinion and final judgment of the Circuit Court of Appeals were entered December 17, 1945.

QUESTIONS PRESENTED.

1. Where a surety company (respondent) executes its bond for the construction of dwellings, which bond it knew would be used as security to obtain funds for construction from a lender (petitioner), and formally consents to the assignment of that bond by the nominal obligee to the lender prior to delivery of the bond to the nominal obligee, and the District Court finds from the evidence the fact that the parties intended that the obligation should be a direct one from the surety to the lender, may the Circuit Court of Appeals overrule or disregard that finding? (Brief, *infra*, pp. 11-19).

2. Under the law of Pennsylvania is a bond conditioned on the construction of specified buildings one guaranteeing the construction of those buildings or one guaranteeing the performance of the building agreement when reference to that agreement appears only in the recital and not in the condition of the bond? (Brief, *infra*, pp. 19-27).

3. May a Circuit Court of Appeals disregard the important rule of law applied in Pennsylvania that contracts of paid sureties shall be construed strictly against them? (Brief, *infra*, pp. 27-31).

4. May a Circuit Court of Appeals apply two different standards of interpretation of written instruments in same case to the consistent benefit of a paid surety and the consistent detriment of an innocent assured? (Brief, pp. 31-33).

REASONS RELIED UPON FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

1. The Circuit Court of Appeals for the Third Circuit has departed so far from the accepted and usual course of judicial procedure, based upon Rule 52(a) of the Federal Rules of Civil Procedure and decisions of this Court, in overruling a District Court's finding of fact as to which there is substantial evidence, that this Court should exercise its supervisory powers.

2. The Circuit Court of Appeals for the Third Circuit has decided important questions of Pennsylvania law as to the proper interpretation of surety bonds in conflict with applicable Pennsylvania decisions.

3. The Circuit Court of Appeals for the Third Circuit has departed so far from the accepted and usual course of judicial proceedings by applying inconsistently two different standards of interpretation to the contracts involved in this case that this Court should exercise its supervisory powers.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings

of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as to this Honorable Court may seem meet.

PROVIDENT TRUST COMPANY OF PHILADELPHIA,

By

WM. CLARKE MASON,
Counsel for Petitioner.

PHILADELPHIA,
February 5, 1946.